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'F' v Ketua Pengarah Jabatan Pendaftaran Negara

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-21NCVC-50–06 OF 2016
AHMAD ZAIDI IBRAHIM J
30 NOVEMBER 2023

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Civil Procedure — Declaration — Gender declaration — Plaintiff sought declaration that she was legally a male — Whether plaintiff was to be treated as male under the law — Whether chromosomal, gonodal and psychiatric factors proven — Whether plaintiff's application to change status of her gender in National Registration Identity Card ('NRIC') from 'female' to 'male' ought to be allowed — Whether there was error/mistake in respect of particulars of NRIC — Births and Deaths Registration Act 1957 s 27(3)

D

Civil Procedure — Res judicata — Whether applicable — Plaintiff was born a female — Plaintiff underwent sex reassignment surgeries — Plaintiff's application to amend her National Registration Identity Card to reflect her gender as male rejected — Plaintiff's judicial review application was dismissed — Plaintiff filed fresh suit for declaration that she was legally a male — Whether plaintiff's claim in the fresh suit caught by res judicata and duplicity of action — Courts of Judicature Act 1964 Schedule para 11

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The plaintiff was born a female but she claimed that she suffered from Gender Dysphoria. The plaintiff then underwent a series of sex re-assignment surgeries ('the SRS') to change her gender from female to male. Having completed the SRS, the plaintiff filed an application to the director-general of the National Registration Department ('the defendant') for a new National Registration Identity Card ('NRIC') or alternatively, for her current NRIC be amended to reflect her gender as male. When the defendant rejected the said application, the plaintiff filed a judicial review application ('OS 203') but the High Court dismissed the same. Her subsequent appeals to the Court of Appeal as well as the Federal Court were also in vain. The plaintiff then filed the present suit to seek for the following reliefs: (a) a declaration that the plaintiff was legally a male; (b) an order of mandamus for the defendant to make an amendment to the plaintiff's name in the NRIC; (c) an order of mandamus for the defendant to make the necessary amendment to the details of the plaintiff's gender from 'female' to 'male' including to change the last digit in the plaintiff's NRIC from 'an even number' to 'an odd number' for the purpose of identifying the plaintiff as a male; and (d) no order as to costs. The issues that arose in the present suit were: (i) whether the plaintiff's claim was caught by res judicata and a duplicity

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of action ('the first issue'); (ii) whether the plaintiff was to be treated as a 'male' under the law ('the second issue'); and (iii) whether the plaintiff's application to change the status of her gender in her NRIC from 'female' to 'male' ought to be allowed ('the third issue').

Held, dismissing the plaintiff's claim with costs of RM10,000:

(1) In relation to the first issue, the court found that: (a) what was claimed and prayed for by the plaintiff in the present suit, were essentially the same and identical in nature to those in OS 203; (b) OS 203 was not dismissed purely on technical/procedural ground; and (c) all the medical reports relied upon by the plaintiff in the present suit were also appraised and duly considered by the High Court judge in deciding OS 203. Therefore, the present suit which was premised on the same facts and evidence, which had been considered and determined by the court previously, was caught by res judicata, for which it could be dismissed pursuant to para 11 of the Schedule to the Courts of Judicature Act 1964. Furthermore, the facts and circumstances of the present case fitted squarely into the elements mentioned in the Federal Court case of *Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor* [2019] 2 MLJ 689; [2019] 3 CLJ 157. Thus, based on the aforesaid, the court dismissed the plaintiff's claim on the ground of res judicata (see paras 31, 37 & 40–42).

(2) The Court of Appeal in *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara* [2012] MLJU 1755; [2013] 4 CLJ 627 ('Kristie Chan') followed the cases of *Bellinger v Bellinger* [2003] UKHL 21 ('Bellinger') and *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33 ('Corbett') and held that gender involved consideration of chromosomal, gonodal, genital and psychiatric factors. Based on the evidence, the court found on a balance of probability that the psychiatric factor and the gonodal factor had been proved by the plaintiff. In relation to the chromosomal factor, it was not disputed that despite the successful SRS, the plaintiff's chromosome remained unchanged, ie, that of a female. Bearing in mind, chromosomal factor was one of the crucial and determining factors as held in *Corbett*, *Bellinger* and *Kristie Chan*, the court found that the plaintiff had failed to show to the court that chromosomal factor/criterium had been fulfilled as required, as such, the plaintiff failed to prove her claim (see paras 58–59, 62–63 & 69).

(3) The court opined that reliefs (b) and (c) was somewhat dependent on the outcome of the plaintiff's claim for relief (a). Since the court had dismissed relief (a), then the claim for reliefs (b) and (c) had no legs to stand on and as such, must also be dismissed. Be that as it may, the court had proceeded to determine the third issue on its merit. In the court's

view, it was evident that s 27(3) of the Births and Deaths Registration Act 1957 excluded the reliefs sought for by the plaintiff in the present case. The court agreed with the finding of the High Court in the case of *Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551; [2005] 1 CLJ 622 that correction/amendment to the NRIC could only be made upon proof that there occasioned a mistake/error in respect of the particulars at the time when such document was issued by the Registration Department. Similarly, in the present case, there was no such mistake/error being committed by the defendant. The particulars relating to gender in her NRIC was correct at the time of issue. Therefore, the court found on a balance of probability that the plaintiff failed to prove that she was entitled to reliefs (b) and (c) (see paras 72–77).

[Bahasa Malaysia summary

Plaintif dilahirkan sebagai perempuan tetapi dia mendakwa bahawa dia mengalami Disforia Jantina. Plaintif kemudian menjalani beberapa siri pembedahan penukaran jantina ('PPJ') untuk menukar jantinanya daripada perempuan kepada lelaki. Setelah melengkapkan PPJ tersebut, plaintif memfailkan permohonan kepada ketua pengarah Jabatan Pendaftaran Negara ('defendan') untuk mendapatkan Kad Pengenalan ('NRIC') baharu atau secara alternatif, agar NRIC semasanya dipinda untuk menggambarkan jantinanya sebagai lelaki. Apabila defendan menolak permohonan tersebut, plaintif memfailkan permohonan semakan kehakiman ('OS 203') tetapi Mahkamah Tinggi menolak permohonan tersebut. Rayuannya kepada Mahkamah Rayuan serta Mahkamah Persekutuan juga tidak berjaya. Plaintif kemudiannya memfailkan saman semasa untuk mendapatkan relif-relif berikut: (a) pengisytiharan bahawa plaintif secara sah adalah seorang lelaki; (b) perintah mandamus untuk defendan membuat pindaan kepada nama plaintif dalam NRIC; (c) perintah mandamus untuk defendan membuat pindaan yang perlu kepada butiran jantina plaintif daripada 'perempuan' kepada 'lelaki' termasuk menukar digit terakhir dalam NRIC plaintif daripada 'nombor genap' kepada 'nombor ganjil' bagi tujuan mengenal pasti plaintif sebagai lelaki; dan (d) tiada perintah berkaitan kos. Isu-isu yang timbul dalam saman semasa ialah: (i) sama ada tuntutan plaintif dihalang oleh res judicata dan tindakan berganda ('isu pertama'); (ii) sama ada plaintif hendaklah dianggap sebagai 'lelaki' di bawah undang-undang ('isu kedua'); dan (iii) sama ada permohonan plaintif untuk menukar status jantinanya dalam NRICnya daripada 'perempuan' kepada 'lelaki' patut dibenarkan ('isu ketiga').

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM10,000:

(1) Berhubung dengan isu pertama, mahkamah mendapati bahawa: (a) apa yang dituntut dan dipohon oleh plaintif dalam saman semasa, pada asasnya adalah sama dan serupa dengan yang terdapat dalam OS 203;

(b) OS 203 tidak ditolak semata-mata atas alasan teknikal/prosedur; dan (c) semua laporan perubatan yang disandarkan oleh plaintif dalam saman semasa telah dinilai dan dipertimbangkan juga dengan sewajarnya oleh hakim Mahkamah Tinggi dalam memutuskan OS 203. Oleh itu, saman semasa yang berasaskan fakta dan keterangan yang sama, yang telah dipertimbangkan dan ditentukan oleh mahkamah sebelum ini, adalah dihalang oleh res judicata, yang mana ia boleh ditolak berdasarkan kepada perenggan 11 kepada Jadual di bawah Akta Mahkamah Kehakiman 1964. Tambahan pula, fakta dan keadaan dalam kes semasa adalah bertepatan dengan elemen-elemen yang disebut dalam kes Mahkamah Persekutuan *Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor* [2019] 2 MLJ 689; [2019] 3 CLJ 157. Oleh itu, berdasarkan perkara-perkara di atas, mahkamah menolak tuntutan plaintif atas alasan res judicata (lihat perenggan 31, 37 & 40–42).

(2) Mahkamah Rayuan dalam kes *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara* [2012] MLJU 1755; [2013] 4 CLJ 627 ('Kristie Chan') mengikuti kes *Bellinger v Bellinger* [2003] UKHL 21 ('Bellinger') dan *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33 ('Corbett') dan memutuskan bahawa jantina melibatkan pertimbangan berkaitan faktor-faktor kromosom, gonad, genital dan psikiatri. Berdasarkan keterangan, mahkamah mendapati atas imbangan kebarangkalian bahawa faktor psikiatri dan faktor gonad telah dibuktikan oleh plaintif. Berhubung dengan faktor kromosom, tidak dipertikaikan bahawa walaupun PPJ tersebut berjaya, kromosom plaintif kekal tidak berubah, iaitu, kromosom perempuan. Dengan mengambil kira bahawa faktor kromosom adalah salah satu faktor penting dan penentu seperti yang diputuskan dalam *Corbett*, *Bellinger* dan *Kristie Chan*, mahkamah mendapati bahawa plaintif telah gagal untuk menunjukkan kepada mahkamah bahawa faktor/kriteria kromosom telah dipenuhi seperti yang dikehendaki, oleh itu, plaintif gagal membuktikan tuntutannya (lihat perenggan 58–59, 62–63 & 69).

(3) Mahkamah berpendapat bahawa relif (b) dan (c) agak bergantung kepada keputusan tuntutan plaintif untuk relif (a). Oleh kerana mahkamah telah menolak relif (a), maka tuntutan untuk relif (b) dan (c) tidak dapat dibuktikan dan oleh itu, ia hendaklah juga ditolak. Walau apa pun, mahkamah telah meneruskan untuk menentukan isu ketiga berdasarkan meritnya. Pada pandangan mahkamah, adalah jelas bahawa s 27(3) Akta Pendaftaran Kelahiran dan Kematian 1957 mengecualikan relif-relif yang dipohon oleh plaintif dalam kes semasa. Mahkamah bersetuju dengan dapatan Mahkamah Tinggi dalam kes *Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551; [2005] 1 CLJ 622 bahawa pembetulan/pindaan kepada NRIC hanya boleh dibuat apabila dibuktikan bahawa terdapat kesilapan/ralat berhubung dengan butiran-butiran pada masa dokumen

tersebut dikeluarkan oleh Jabatan Pendaftaran. Begitu juga, dalam kes semasa, tiada kesilapan/ralat yang dilakukan oleh defendan. Butiran yang berkaitan dengan jantina dalam NRICnya adalah betul pada masa ia dikeluarkan. Oleh itu, mahkamah mendapati atas imbangan kebarangkalian bahawa plaintif gagal membuktikan bahawa dia berhak mendapat relif (b) dan (c) (lihat perenggan 72–77).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Attorney General for the Commonwealth v 'Kevin and Jennifer' (Human Rights and Equal Opportunity Commission intervening) [2004] 2 LRC 254; [2003] Fam CA 94 (refd)

Bellinger v Bellinger [2003] UKHL 21, HL (folld)

Corbett v Corbett (otherwise Ashley) [1970] 2 All ER 33, HC (folld)

Fau En Ji v Ketua Pengarah Ketua Pengarah Jabatan Pendaftaran Negara [2014] MLJU 1946; [2015] 1 CLJ 803, HC (refd)

Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors [1996] 3 MLJ 259, HC (refd)

Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara [2012] MLJU 1755; [2013] 4 CLJ 627, CA (folld)

Penang Port Commission v Kanawagi s/o Seperumaniam [2008] 6 MLJ 686, CA (refd)

Pilecon Engineering Bhd v Malayan Banking Bhd & Ors [2012] 3 MLJ 100, HC (refd)

Re JG, JG v Pengarah Jabatan Pendaftaran Negara [2006] 1 MLJ 90; [2005] 4 CLJ 710, HC (not folld)

Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd [2018] 5 MLJ 204; [2018] 6 CLJ 271, FC (refd)

Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor [2019] 2 MLJ 689; [2019] 3 CLJ 157, FC (folld)

Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara [2016] 12 MLJ 370; [2016] 8 CLJ 427, HC (refd)

Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara [2005] 1 MLJ 551; [2005] 1 CLJ 622, HC (folld)

Legislation referred to

Births and Deaths Registration Act 1957 s 27, 27(3)
Courts of Judicature Act 1964 Schedule, para 11
National Registration Act 1959 s 6(2)
National Registration Regulations 1990 reg 14

JT Chong (JT Chong Assoc) for the plaintiff.
Maisarah bt Othman (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Ahmad Zaidi Ibrahim J:

INTRODUCTION:

[1] To start with, pursuant to this court's order dated 28 September 2016 by Roslan Abu Bakar JC (as His Lordship then was) for encl 10, to preserve the plaintiff's anonymity, the plaintiff shall hereinafter be referred to as 'F' or as 'the plaintiff'.

BRIEF BACKGROUND:

[2] The plaintiff ('F') was born a female in 1987. She claimed to suffer from Gender Dysphoria ('GD') since young. Between the years 2011 to 2013 she underwent a series of sex reassignment surgeries ('SRS') in Thailand to change her gender from female to male. Having completed the SRS, she then applied to the defendant (Ketua Pengarah Jabatan Pendaftaran Negara), for a new National Registration Identity Card ('NRIC') or alternatively, for her current NRIC be amended to reflect her gender as male. The defendant rejected her said application. Dissatisfied, she applied to the High Court ('HC') for a judicial review to challenge the defendant's said decision. The HC dismissed her said application. Her follow up appeals to the Court of Appeal ('COA') and the Federal Court ('FC') against the decision of the HC were also unsuccessful. Having failed to secure leave to appeal from the FC, she then commenced this suit, seeking in para 15 of her statement of claim ('SOC') the following reliefs:

(1) A declaration that the Plaintiff is legally a male.

(2) An order of mandamus that the Defendant makes an amendment to the Plaintiff's name in the National Registration Identity Card Number (NRIC) to 'Kelven Fau'.

(3) An order of mandamus that the Defendant makes a necessary amendment to the details of the Plaintiff's gender from 'female' to 'male' including to change the last digit in the Plaintiff's NRIC from 'an even number' to 'an odd number' for the purpose of identifying the Plaintiff as a male.

(4) No Order as to Costs.

[3] In her SOC and reply to the defendant's statement of defence, the plaintiff pleaded that the SRS had succeeded in changing her gender from female to male and thus entitling her to the reliefs above mentioned.

[4] The defendant disputed the plaintiff's abovesaid claim. Briefly, in the statement of defence ('SOD'), the defendant pleaded the following:

(a) that the plaintiff's claim is caught by the doctrine of res judicata and a duplicity of action;

(b) that the reliefs sought are premature in nature;

(c) that the plaintiff's application to amend her NRIC relating to her gender and name was not made in accordance to the National Registration Regulations 1990 (Peraturan-Peraturan Pendaftaran Negara 1990) and thus, was correctly rejected by the defendant; and

(d) on merit, the defendant disputes the plaintiff's claim that she is now legally a male.

[5] In her reply to the statement of defence, the plaintiff denied that her claim herein is caught by res judicata or is a duplicity of action.

DECISION OF THE COURT AFTER TRIAL

[6] After having appraised wholly the evidence adduced and having considered the submissions by learned counsels for both sides, based on the findings and grounds to be narrated hereinafter, I find that the plaintiff had, on the balance of probability, failed to prove her claim. Thus, the plaintiff's claim is dismissed with costs of RM10,000 to the defendant.

[7] To put it briefly, I find that the plaintiff's claim herein is caught by res judicata. On merits, I find that the plaintiff failed to prove that she is now legally a male despite the SRS surgeries.

CHRONOLOGY OF EVENTS

[8] The undisputed material facts and events are as follows:

(a) the plaintiff was born a female on 26 October 1989 as stated in her Birth Registration No 11099420 ('birth certificate/BC');

(b) on 26 January 2001, at 12 years of age the plaintiff was issued with her NRIC. Subsequently, at 18 years old in age she was issued a replacement/new NRIC by the defendant. In both the aforementioned NRICs, her sex status is certified as female, based on information given by the father;

(c) sometime in 2012, she underwent sex reassignment surgeries ('SRS') in Thailand, to change her gender from 'female' to 'male';

(d) after the SRS, vide letter dated 18 August 2013, she applied to Jabatan Pendaftaran Negara ('defendant') for a new NRIC or alternatively, for her current NRIC be amended to indicate her gender as 'male' and for her name be changed to 'Kelven Fau'. However, her application was refused by the defendant vide letter dated 29 August 2013;

(e) dissatisfied over the defendant's rejection, she applied to the Kuala

Lumpur High Court ('HC') vide Originating Summons No 25–203–10 of 2013 ('OS 203') for judicial review to challenge the defendant's said decision. The HC dismissed her said application;

(f) aggrieved, she appealed to the Court of Appeal ('COA'). However, the COA dismissed her appeal;

(g) she then sought for leave to appeal further to the Federal Court ('FC'). Again, her attempt was fruitless as the FC refused to grant her leave; and

(h) flowing from there, she commenced the suit herein.

BACKGROUND FACT

The plaintiff's case

[9] The plaintiff called four witnesses. They are:

(a) PW1 — the plaintiff herself;

(b) PW2 — Lau Hui Li, the plaintiff's female girlfriend and live-in partner;

(c) PW3 — Dato' Dr Selvalingam Sothilingam ('Dr Selvalingam'), Consultant Urologist; and

(d) PW4 — Dr Barathi Vengadasalam ('Dr Barathi'), Consultant Psychiatrist.

[10] The material facts adduced through the witnesses above mentioned can be summarised as follows: the plaintiff ('PW1'), was born a female on 12 October 1989 in Penang as stated in her BC and NRIC. The plaintiff claimed that she suffered from 'Gender Identity Disorder/Gender Dysphoria' ('GD') since young. She felt like a male trapped inside the body of a female and ever since her school going days, her life, appearance and behaviour is that of a male.

[11] Circa 2009, she started taking male hormones, as prescribed by her doctor, Dr Edward Chan ('Dr Chan'). About a year thereafter, Dr Chan opined that she was ready for sex reassignment surgery ('SRS') and recommended her Yanhee International Hospital, Bangkok, Thailand ('YIH').

[12] In 2011 she went to YIH. There, she was seen by Dr Ajcara Roumcharoenkiat, a psychiatrist. Dr Ajcara diagnosed her of suffering from GD and viewed that she was suited to undergo SRS.

[13] Thereafter, she underwent the following surgeries on the following dates:

(a) 16 February 2011 — a 'mastectomy' performed by Dr Thawatchai Boopadhanapong and a 'TAH-BSO/Transabdominal Hysterectomy with Bilateral Salpingo-oophorectomy' by one Dr Amnart Techowanich (the first stage);

(b) 5 February 2012 to 11 February 2012 — a surgery to totally close her vaginal canal and to reconstruct a uterus and urethra (the second stage); and

(c) 15 December 2012 to 28 December 2012 — a surgery to construct a male sex organ by Dr Sukit Worathamrong (the third stage). Briefly, the third stage involved the construction of a penis, the scrotum, nerves for sensation and the urethra.

[14] Upon her return home after the SRS, she was further examined by Dr Wong Kok Kien ('Dr Wong') and Dr Kenneth Koh ('Dr Koh') from Gleneagles Hospital, Kuala Lumpur and thereafter by Dato' Dr Selvalingam ('PW3') and Dr Barathi ('PW4') of Pantai Hospital, Kuala Lumpur. They all confirmed that the plaintiff's SRS were successful.

[15] Thereafter, vide her letter to the defendant dated 19 August 2013, the plaintiff applied for a new NRIC that identify her as male or alternatively, for the defendant to amend her current NRIC pertaining to her gender from 'female' to 'male'. In addition, she also applied for her name to be changed to 'Kelven Fau'. Alas, vide letter dated 2 September 2013, the defendant rejected her said request.

[16] According to the plaintiff although identified as a 'female', her lifestyle, appearance (dress preference) and behaviour is that of a male. She has no sexual interest/desire towards any male. She now works as an IT Consultant and everyone at her workplace accepted her as a male, including her employer and clients. She is also in a relationship with her current live-in girlfriend ('PW2') with whom she has a healthy sexual relationship.

[17] PW2 is the plaintiff's live-in girlfriend and her sex partner. PW2 testified that the plaintiff was able to performed sexual intercourse as a man and that they both have a normal sex life. PW2 however accepted and conceded the plaintiff was unable to ejaculate (semen) and thus will be unable to impregnate her. PW2 agreed and accepted the fact that she will not be able to conceive any child with the plaintiff due to the inability of the plaintiff to produce semen.

[18] PW3 is a Consultant Urologist who also examined the plaintiff after her SRS surgeries. According to PW3 from his physical examination and observation of the plaintiff, he found the plaintiff's appearance to be that of a male, who spoke with a male voice. The plaintiff has no breasts and vaginal

opening. She has a reconstructed penis with two scrotal pouches. The penis is functional for voiding and sexual intercourse. The penis feels hard due to silicon implant. The plaintiff can void (urinate) as a male (whilst standing) and that she was able have sexual intercourse. PW3 however confirmed that the plaintiff will not be able to ejaculate nor produce sperm/semen. PW3 opined that the SRS undergone by the plaintiff was successful and that the plaintiff can be considered a male from the urological perspective (PW3 had prepared his specialist report as per encl 23 — *ikatan dokumen dipersetujui* [2] pp 23–27).

[19] PW4 ('Dr Barathi') is a Consultant Psychiatrist. SD4 interviewed the plaintiff, the plaintiff's mother and her partner (PW2) after her SRS. Based on her interviews and examination, she opined that the plaintiff suffered from GD, a medical condition recognised by the WHO, as per the 'Diagnostic and Statistical Manual of Mental Disorder' (5th Ed) (DSM-V).

[20] According to PW4, GD is an irreversible condition and SRS is a recognised medical procedure to tackle GD. PW4 concluded that the plaintiff has fulfilled the criteria of the DSM-V which made her suited to perform the SRS. Apart from relying on the interviews abovesaid and the medical reports made available to her, PW4 also referred to published medical journals and articles in arriving at her conclusion. PW4 opined that the applicant fulfilled the criteria for Gender Dysphoria and concurred with the finding of Dr Kenneth Koh and Dr Wong Kok Kien (PW4's is as per encl 23 — *ikatan dokumen dipersetujui* [2] pp 1–22).

The defendant's case

[21] The defendant called the following six witnesses:

(a) DW1 — Abu Bakar bin Mohamed Tahir (Penolong Pengarah, JPN);

(b) DW2 — Dr Ahmad Rostam bin Md Zin (Psychiatrist);

(c) DW3 — Dr Siti Maisarah Ahmad (Consultant — Clinical O&G);

(d) DW4 — Dr Noor Ashani Md Yusoff (Consultant Urologist);

(e) DW5 — Dr Roziana Ariffin (Consultant Cytogeneticist); and

(f) DW6 — Prof Dato Dr Zukifli Md Zainuddin (Consultant Urologist).

[22] DW1 admitted receiving the letter dated 19 August 2013 from the plaintiff applying for a new NRIC to identify her as male or alternatively, to amend the particulars in her current NRIC pertaining to her gender including her name. DW1 admitted rejecting the said application on 29 August 2013 as the plaintiff had failed to obtain any such order from the court.

[23] Further, added DW1, there was no error nor mistake to all the information in the plaintiff's BC and NRIC particularly, the one concerning her gender. All the particulars in her BC and NRIC are provided by her parents to the defendant as in 'Borang JPN KP.01'. Also, according to DW1, on 8 January 2002 the plaintiff applied for a replacement NRIC from the defendant where, she again declared her gender as female. Thus, based on her own declaration, there was no error nor mistake regarding her gender as female in her current NRIC, to empower the defendant to amend/correct her NRIC.

[24] The plaintiff was also examined by the defendant's own medical and psychiatric experts from the 'Bahagian Obstetrik & Ginekologi, Urologi dan Psikiatri' (DW2-DW6). Having examined the plaintiff, the defendant's experts are of the view that the plaintiff failed to fulfil all the legal and biological conditions/criteria of a male, notwithstanding the SRS performed on the plaintiff.

ISSUES FOR DETERMINATION

[25] As per the statement of agreed issues, the core issues for determination by the court are:

(i) whether the plaintiff's claim is caught by res judicata and a multiplicity of action?

(ii) whether the plaintiff is to be treated as a 'male' under the law?; and

(iii) whether the plaintiff's application to change the status of her gender in her NRIC from 'female' to 'male' ought to be allowed?

SUBMISSIONS

Issue (i) — Whether plaintiff's claim is res judicata and a duplicity of action?

The plaintiff's submission

[26] Learned counsel submitted that the plaintiff's claim is not caught by res judicata because the Kuala Lumpur High Court Originating Summons No 25–203–10 of 2013 ('OS 203') filed earlier by the plaintiff against the defendant was dismissed not on its merit by the court but purely on procedural ground. According to counsel, the learned HCJ as per in the grounds of judgment ('GOJ'), found that the mode (judicial review) chosen by the plaintiff was wrong because on the facts and circumstances of the case, the correct mode should be by way of a writ action. The learned HCJ did not go into the factual matrix of OS 203. Thus, according to the counsel, the defendant's point on res judicata is without merit and this suit ought to be determined on its merit.

[27] As to duplicity of action, counsel submitted that as OS 203 had been disposed of by the court and currently leaving only this suit pending in court, the defendant's point on duplicity of action also cannot stand and is now academic.

The defendant's submission

[28] The learned senior federal counsel ('SFC') for the defendant contrarily, submitted that the plaintiff claim herein is caught by res judicata because the reliefs sought in this suit herein are similar and the same to those in her earlier action/application ('OS 203'), which had been determined and disposed by the High Court, the COA and the FC. Learned SFC, referred to the GOJ of the learned HCJ for OS 203, ie *Fau En Ji v Ketua Pengarah Jabatan Pendaftaran Negara* [2015] 1 CLJ 803, per Zaleha Yusof J.

[29] Learned SFC added that at p 809 of her GOJ, the learned HCJ had stated that the plaintiff should have filed a writ rather than a judicial review application, the plaintiff failed to take heed and instead proceeded to appeal to the COA and thereafter to the FC. Only after she failed before the FC did she file this writ hinged on the same facts and prayers, asking for the same and similar reliefs, which learned SFC submitted, tantamounted to a duplicity of action and an abuse of process of the court.

Decision and findings of this court for issue (i)

Whether plaintiff's claim is res judicata and a duplicity of action?

[30] As to the applicable law, the Courts of Judicature Act 1964 para 11 of the Schedule empowers the court to dismiss or stay proceedings where the matter in question is res judicata between the parties, or by reason of multiplicity of proceedings. The law on res judicata is settled and trite as decided amongst others, in the following case authorities:

(a) *Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors* [1996] 3 MLJ 259 at p 275;

(b) *Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686 at p 693;

(c) *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783;

(d) *Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor* [2019] 2 MLJ 689; [2019] 3 CLJ 157;

(e) *Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd* [2018] 5 MLJ 204; [2018] 6 CLJ 271; and

(f) *Pilecon Engineering Bhd v Malayan Banking Bhd & Ors* [2012] 3 MLJ 100.

[31] After having perused the plaintiff's pleadings, particularly the reliefs prayed for, it is quite apparent to me that what was claimed and prayed for by the plaintiff in this suit, are essentially the same and identical in nature to those in OS 203. I find the chart submitted by the learned SFC during submission of much assistance. The said chart is reproduced below for a clearer picture:

The present suit	Judicial review (OS 203)
Facts: The plaintiff, who born a female on the 21 October 2019. Throughout her childhood, the plaintiff suffered from a symptom of a medical condition known as 'Gender Identity Disorder' or Gender Dysphoria ('GDT'). Sometimes in 2009–2010, the plaintiff sought for treatment from a medical professional known as Dr Edward Chan of Optimum Well-Being Laboratories who later on issued a letter dated 18 May 2010 stated the recommendation for the plaintiff to undergo sex reassignment surgery at Yanhee International Hospital in Bangkok, Thailand. The plaintiff went to Vanhee International Hospital and she was examined by two psychiatrists. One of them, Dr Ajchara Roumcharoenkiat, came to the same and she was suitable for the sex reassignment surgery. The plaintiff went through various stages of surgery that were conducted by Dr Thawatchai Boopadhanapong and Dr Amnat Techowanich (para 7 statement of claim).	Facts: The plaintiff, who was born a female on 21 October 1989, had undergone some surgical procedures at the Yanhee International Hospital, Thailand between the year 2011 to 2012 for the purpose of changing her sex from female to male. At the Yanhee Hospital, the plaintiff was treated by the following medical doctors and surgeons: (i) Dr Thawatchai Boonpadhanapon, a plastic surgeon; (ii) Dr Amnat Techowanich, a surgeon from the O8-GVN department; (iii) Dr Ajchara Roumcharoenkiat, a psychiatrist; and (iv) Dr Sukit Worathamrong, a certified plastic and reconstructive surgeon. Upon completion of the surgical procedures in Thailand, the plaintiff went for further medical check–up with three medical professionals practising in Malaysia, ie (i) Dr Wong Kok Kien, a Consultant Obstetrician and Gynaecologist from Gleneagles Hospital Kuala Lumpur; (ii) Dr Kenneth Koh Beng Hock, a Consultant Urologist from Pantai Hospital Kuala Lumpur; and

For the final stage of the surgery, which involved the reconstruction of all male organ structures, Dr Sukit Warathamrong had involved (para 10 statement of claim). Upon completion of her surgery, she went for further medical check-up with four medical professionals practising in Malaysia, ie: (i) Dr Wong Kok Kien, a Consultant Obstetrician and Gynaecologist from Gleneagles Hospital Kuala Lumpur; (ii) Dr Kenneth Koh Beng Hock, a Consultant Urologist from Pantai Hospital Kuala Lumpur; (iii) Dr Bharathi S Vengadasalam, a Consultant Psychiatrist from Pantai Hospital Kuala Lumpur; and (iv) Dr Selvalingam Sothilingam, Consultant Urologist from Pantai Hospital Kuala Lumpur (not stated in the statement of claim). On the 19 August 2013, the plaintiff made an application to the defendant for change of name and gender and enclosing the medical reports from the Thai surgeons and the Malaysian doctors as supporting documents. By a letter dated 2 September 2013, the defendant informed the plaintiff that the application for change of name and gender was rejected and that the rejection was based on 'Arahan Jabatan Pendaftaran Negara Bil 9/2007' dated 21 August 2007 which states that the defendant must produce a court order declaring the gender of a person before the defendant can change the gender detail in the NRIC. Aggrieved, the plaintiff filed this present civil suit.	(iii) Dr Bharathi S Vengadasalam, a Consultant Psychiatrist from Pantai Hospital Kuala Lumpur. On the 19 August 2013, the plaintiff made an application to the defendant for change of name and gender and enclosing the medical reports from the Thai surgeons and the three Malaysian doctors as supporting documents. By a letter dated 2 September 2013, the defendant informed the plaintiff that the application for change of name and gender was rejected and that the rejection was based on the decision made by the Panel Pindaan Butiran Kad Pengenalan on 29 August 2013. Aggrieved, the plaintiff filed the judicial review application.

[32] It is pertinent to note that the plaintiff did not take issue to the abovesaid chart and its content.

[33] To answer issue (i), it is also of assistance to look at the reliefs sought for in this suit and OS 203. For this suit the reliefs prayed for are:

(a) a declaration that the plaintiff is legally a male;

(b) an order of mandamus that the defendant makes an amendment to the plaintiff's name in the National Registration Indentity Card Number (NRIC) to 'Kelven Fau';

(c) an order of mandamus that the defendant makes a necessary amendment to the details of the plaintiff's gender from 'female' to 'male' including to change the last digit in the plaintiff's NRIC from 'an even number' to 'an odd number' for the purpose of identifying the plaintiff as a male; and

(d) no order as to costs.

[34] For OS 203, the plaintiff asked for the following reliefs:

(a) declaration that the plaintiff is legally a male;

(b) an order of certiorari to quash the decision made by the defendant dated 2 September 2013;

(c) an order of mandamus that the defendant amends the plaintiff's name from 'Fau En Ji' to 'Kelven Fau'; and

(d) an order of mandamus that the defendant to amend the details of the plaintiff's gender from 'female' to 'male' and to change the last digit in the plaintiff's identification number from 'an even number' to 'an odd number'.

[35] Based on the abovesaid, learned SFC submitted that the plaintiff has filed two actions in court which are based on the same facts and had prayed for the same/identical reliefs, one of which ('OS 203') had been duly considered, determined and disposed of by the court on merit.

[36] If what was submitted by learned SFC aforesaid is true, then it goes without saying that the present suit can be dismissed on the ground of res judicata pursuant to the Courts of Judicature Act 1964 para 11 of the Schedule. In my view, to determine the issue, it is essential to revisit the grounds of judgment for OS 203 as reported in *Fau En Ji v Ketua Pengarah Jabatan Pendaftaran Negara*, per Zaleha Yusof J. The relevant parts of the GOJ are as follows:

JUDGMENT

Zaleha Yusof J:

Issue:

[6] Whether the respondent had acted reasonably, legally and rationally, without procedural impropriety and mala fide; in rejecting the applicant's application for change of name and gender.

Decision:

...

[8] I have scrutinised medical reports submitted by the applicant as shown in encl 3. The relevant ones are found in exhs A5, A6, A7, A8, A9 and A11. Exhibit A5 was signed by Dr Thawatchai Boonpadhanapong, Dr Amnat Techowanich and Dr Ajchara Roumcharoenkiat. It merely states that mastectomy to remove breasts and hysterectomy to remove the applicant's uterus were done. This only covers the gonodal factor of a female.

[9] Exhibit A6 is by Dr Sukit Worathamrong. He confirmed that all female sex organs of the applicant, had been removed (removal of gonodal factor of a female) and that urethra, penis and all male sex organs structures had been reconstructed (gonodal male factor). With that he concluded that the applicant could now 'be classified as male identity', and expect the applicant 'to have a better lifestyle with physically and psychologically'.

[10] Exhibit A7 is a letter by Dr Wong Kok Kie. He noted the evidence of removal of female organ and of the presence of a well constructed penis and scrotum. This covers the male gonodal factors. Exh A-8 is a short report by Dr Kenneth Koh who found the applicant to be on male hormone replacement therapy and had a deep voice, prominent larynx and male distribution of body hair. This only covers the male gonodal factors.

[11] Exhibit A9 by Dr Bharathi S Vengadasalam merely confirms that the applicant was receiving male hormone and upon physical examination found the applicant to have male character and male organ. This covers the male gonodal factors. Exhibit A11 is also by Dr Bharathi S Vengadasalam. He opined that the applicant fulfilled the criteria for Gender Dysphoria and concurred with the finding of Dr Kenneth Koh and Dr Wong Kok Kien.

[12] Based on the above medical reports, I totally agree with the respondent's argument that:

(a) none of the medical officers gave evidence pertaining to the chromosal factor;

(b) none of the medical officers gave evidence pertaining to the genital factor which involves internal sex organs and functions;

(c) none of the medical officer gave evidence pertaining to what can be defined as gender as a female and as a male;

(d) none of the medical officers gave evidence pertaining to what are the characteristic of a male and a female (generally); and

(e) none of the medical officers gave evidence pertaining to whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card, based on the requirements laid out in case law.

[13] Learned counsel for the applicant has argued that there is a clear departure from *Corbett* and *Bellinger* in that the Court of Appeal, in *Kristie Chan* was prepared to consider and take into account the psychological factor (in additional to the three biological factors) in determining the gender of the applicant. With due respect, the *Corbett* which was followed by *Bellinger* did not confine only to the three biological factors. As Ormrod J in *Corbett* had stated:

> ... there are at least, four criteria for assessing the sexual condition of an individual. These are:
>
> i. Chromosomal factors;
>
> ii. Gonodal factors (ie presence or absence of testes or ovaries);
>
> iii. Genital factors (including internal sex organs); and
>
> iv. Psychological factors.
>
> Hence, I opine, psychological factor alone or gonodal factors are insufficient to assess the applicant's sexual condition.
>
> ...

[15] From the cause papers before me, I am satisfied that the applicant has failed to comply with the test as stipulated by the Court of Appeal in *Kristie Chan*.

[37] Even though it was stated at para 6 of the GOJ abovesaid that it is a question relating to judicial review, for the court to see whether the defendant had acted reasonably, legally and rationally, without procedural impropriety and mala fide when rejecting the plaintiff's application, it is apparent that Her Ladyship had dealt with merits of the application by going into in depth the factual matrix of the case. Thus, having had the benefit of thoroughly perusing the GOJ aforesaid, I am not persuaded by the plaintiff's counsel submission that OS 203 was dismissed purely on technical/procedural ground ie, due to a wrong mode taken by the plaintiff.

[38] For our present suit, the plaintiff relied, inter alia, on the testimonies and medical reports by PW3 (Dr Selvalingam) and PW4 (Dr Barathi) to support her claim. The plaintiff also relied on the following reports:

(a) report by Dr Thawatchai Boonphanaphong, Dr Amnat Technowanich and Dr Ajchara Roumcharoenkian dated 10 June 2011;

(b) report by Dr Sukit Worathamrong 1 February 2013;

(c) report by Dr Wong Kok Kien dated 14 March 2013;

(d) report by Dr Kenneth Koh dated 26 March 2013; and

(e) report by Dr Edward Chan dated 18 May 2013.

[39] lt is apparent in OS 203, the learned HCJ had scrutinised and considered thoroughly the medical reports of the plaintiff's experts abovementioned, including the facts deposed and adduced via the affidavits of the plaintiff as manifested in paras 8, 9, 10 and 11 of the GOJ.

[40] Save for PW3 who did not feature in OS 203, all the aforesaid reports were appraised and duly considered by the HCJ in deciding/ruling OS 203 as per at paras 8, 9, 10 and 11 of the GOJ. Hence, in my considered view, this suit which is premised on the same facts and evidence, which had been considered and determined by the court previously, is caught by res judicata, for which it can be dismissed pursuant para 11 of the Schedule to the Courts of Judicature Act 1964.

[41] To wrapped up this point on res judicata, it would suffice to see what our apex court had to say in *Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor* [2019] 2 MLJ 689; [2019] 3 CLJ 157 where it was held as follows:

> [34] Firstly, on the issue of res judicata, it is necessary to reiterate the elements which constitute res judicata. For this purpose we find the book *Spencer Bower and Turner Res Judicata* (3rd Ed, 1996) particularly useful. There the learned authors sets out at p 10, para 19 what involved in the burden of showing res judicata which consist of six matters:
>
> (a) the decision was judicial in the relevant sense;
>
> (b) it was in fact pronounced;
>
> (c) the tribunal had jurisdiction over the parties and the subject matters;
>
> (d) the decision was: (a) final, and (b) on the merits;
>
> (e) it determined the same questions as that raised in the letter question; and
>
> (f) the parties on the latter were either parties in the earlier litigation or their privies, or the earlier decision was in rem.

[42] I find that the facts and circumstances of our case fitted squarely into the elements above mentioned. Thus, based on the aforesaid, the plaintiff claim herewith is dismissed on the ground of res judicata.

[43] Next, I shall deal with issue (ii).

Issue (ii) — Whether the plaintiff is to be treated as a 'male' under the law?

The law

[44] At present, the stand/view of the courts pertaining to gender reassignment is somewhat split between two schools, the traditional and progressive as termed by James Foong J in *Re JG, JG v Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90; [2005] 4 CLJ 710. The 'progressive', as the term denotes recognises gender reassignment, as against the 'traditionalist' which had refused to do so. Amongst the cases referred to by the parties where the courts had recognised gender reassignment/sex change are:

(a) *Re JG, JG v Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90; [2005] 4 CLJ 710;

(b) *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara* [2016] 12 MLJ 370; [2016] 8 CLJ 427; and

(c) *Attorney General for the Commonwealth v 'Kevin and Jennifer' (Human Rights and Equal Opportunity Commission intervening)* [2004] 2 LRC 254; [2003] Fam CA 94 (*Re Kevin*).

[45] It bears mention that *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara* was subsequently overturned by the Court of Appeal.

[46] Whilst, in the following cases, the courts had refused to recognise gender reassignment:

(a) *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33;

(b) *Bellinger v Bellinger* [2003] UKHL 21; House of Lord;

(c) *Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551; [2005] 1 CLJ 622;

(d) *Fau En Ji v Ketua Pengarah Ketua Pengarah Jabatan Pendaftaran Negara* [2014] MLJU 1946; [2015] 1 CLJ 803; and

(e) *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara* [2012] MLJU 1755; [2013] 4 CLJ 627.

The plaintiff's submission

[47] Learned counsel submitted that GD is a recognised medical condition and is irreversible. SRS is recognised as a procedure to treat the said condition and that it is now possible to change a person's gender to be in congruent with the person's own desired gender. Counsel contended that the plaintiff suffered from GD prior to undergoing her SRS as supported by the evidence/testimonies of PW4 and PW3, the plaintiff's experts. Counsel maintained that their testimonies must be given credence and much greater

weight as compared to the defendant's witnesses. PW4 for instance, is more thorough and in depth in her interview and examination of the plaintiff, as compared to the defendant's witnesses.

[48] Counsel added that, for someone who has successfully undergone SRS, the plaintiff is entitled to be recognised as a male from the medical and legal perspective, now that she has been socially accepted and acknowledged as a male by her family, peers and doctors. Counsel submitted that there is a clear consensus amongst the medical experts from both sides that a person is recognised and treated as having acquired his/her desired gender if he/she has successfully completed the SRS.

[49] Counsel referred to the Australian Court of Appeal case of *Attorney General for the Commonwealth v 'Kevin and Jennifer' (Human Rights and Equal Opportunity Commission intervening)* [2004] 2 LRC 254[2003] Fam CA 94 (*Re Kevin*) and our High Court case of *Re JG, JG v Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90; [2005] 4 CLJ 710. Counsel invited the court to follow them for being more just and reasonable and in sync with current trend and medical development. As earlier noted these are two cases whereby the courts recognised the new gender of the plaintiff/applicant pursuant to SRS.

[50] As to the case of *Corbett* cited and referred to by the defendant, counsel submitted that the law propounded is now archaic and outdated. Instead, counsel urged this court to accept the dissenting judgment/decision in *Bellinger*.

The defendant's submission

[51] Foremost, learned SFC submitted, the court needs to fall back to the case of *Kristie Chan*. In applying the principle propounded in *Corbert* and *Bellinger*, the Court of Appeal concluded that gender involves consideration of chromosomal, gonodal, genital and psychological factors.

[52] Learned SFC did not dispute that GD is a medical condition and that SRS is a medical procedure available to treat the said condition. However, learned SFC disagreed that GD is irreversible as there are reported cases of reversion by gender/sex reassigned persons, who had a change of mind post SRS.

[53] Learned SFC submitted that although the plaintiff had undergone a successful SRS, she failed to prove that all the factors and criteria as mentioned in *Kristie Chan* abovesaid has been fulfilled. Learned SFC contended that the plaintiff's medical reports from YIH Thailand only covers the female gonodal

factor. As for the report by Dr Wong Kok Kien on the constructed male sexual organs (penis and scrotum), learned SFC averred that it only covers the male gonodal factor. Likewise, the report by Dr Kenneth Koh Beng Hock, on the plaintiff's hormone replacement therapy, having a deep voice, prominent larynx and male distribution of body hairs, it also only covers the male gonodal factor. Similarly, the evidence by Dr Barathi (PW4) who concurred with the finding of Dr Kenneth Koh and Dr Wong Kok Kien, it covers only the male gonodal factors.

[54] As to the plaintiff's counsel submission that the evidence/testimonies of PW3 and PW4 are more reliable and cogent as against the defendant's, the learned SFC contrarily submitted that PW4 is shaky and unreliable, as compared to the defendant's witnesses.

[55] SFC concluded that even if the plaintiff had shown that the SRS performed on her was successful and had fulfilled the gonodal and psychological treatment requirement, the plaintiff failed to prove the chromosomal factor. As such, SFC submitted that despite the plaintiff's current physical appearance, sexual relationship with her partner and the acceptance by her peers and her medical doctors, the plaintiff failed to prove that she is medically and biologically a male. Learned SFC relied on the views of the defendant's experts (DW2-DW6). DW3-DW6 testified that the gender of a person is conclusively determined by one's chromosome and not one's appearance or social acceptance.

[56] Learned SFC relied amongst others on the local High Court cases of *Wong Chiou Yong v JPN and Fau En Ji v Ketua Pengarah JPN* and the English cases of *Corbett* and *Bellinger*. Counsel urged the Court to refer to *Kristie Chan* for the criteria/factors in determining the plaintiff's gender.

Decision of the court — issues (ii)

[57] Foremost, it is agreed by both sides that GD is a recognised medical condition and that SRS is one of the legitimate medical procedures to treat it. It is also not in dispute that the plaintiff herein suffered from GD and had underwent SRS in Thailand.

[58] Learned counsel submitted that the plaintiff had fulfilled all the criteria as laid down in *Kristie Chan* and thus entitled to be treated and recognised as being a male from the medical perspective. The SFC expectedly submitted and contended otherwise. The Court of Appeal in *Kristie Chan* followed the cases of *Bellinger* and *Corbett* and held that gender involves consideration of chromosomal, gonodal, genital and psychiatric factors. Thus, the question is whether the plaintiff in our case herein had fulfilled the criteria aforesaid to

entitle to the declaratory reliefs prayed for?

Psychiatric/psychological factor

[59] There is no dispute amongst the experts witnesses that there should be at least a psychiatrist to verify and confirm the medical condition suffered by the plaintiff before recommendation may be made for him to undergo SRS. Counsel submitted that this requirement had been satisfied by the plaintiff as she was examined by one Dr Ajchara Roumcharoenkiat, a psychiatrist from the YIH. The plaintiff also referred on the medical report dated 10 June 2011, signed by three medical doctors from YIH which stated that the plaintiff was examined by the psychiatrist on 15 February 2011 and on the letter dated 2 January 2013, also from YIH which also confirmed that the plaintiff was examined by two psychiatrists on 16 February 2011. The two letters supported the recommendation for the plaintiff to proceed with SRS. Based on those evidence aforesaid, I find on a balance of probability, the psychiatric factor/criteria had been proved by the plaintiff.

Gonodal factor

[60] Learned counsel submitted the gonodal factor/criteria (both male and female) had been proved by the plaintiff via the evidence of PW3 amongst others. PW3 confirmed that having physically examined the plaintiff, he noticed the plaintiff having a male organ (constructed penis). Based on that, amongst others, PW3 considered the plaintiff gender to be a male.

[61] The defendant did not dispute the existence of the constructed penis. Anyway, an interesting unchallenged fact adduced through PW3 pertaining to the characteristic of the plaintiff's constructed penis wherein. PW3 testified that he found the plaintiff's constructed penis to be in continuous and perpetual state of erection, due to silicon implant. To me it is most unlike a normal/natural penis which would only naturally/normally erect on being sexually aroused. Adding to that, the plaintiff's constructed penis and scrotum was unable to produce and to ejaculate semen. Thus, in that circumstances, can it be said that a penis of a male person had been constructed? I have my reservation but to be fair to the plaintiff, I am not a urologist nor medical expert on that field.

[62] Be that as it may, to prove the gonodal factor, counsel also relied on other evidence, viz, the medical report of Dr Kenneth Koh, who found the plaintiff to be on male hormone treatment, to have a deep voice, a prominent larynx and distribution of body hair. Additionally, the evidence of Dr Bharathi (PW4) who confirmed that the plaintiff was receiving male hormone and having male character and male organ. Hence, even if I am to conclude that the

constructed penis is not a penis as defined medically or biologically, based on the abovesaid, in my view, the plaintiff has, on a balance of probability, proved the gonodal factor.

Chromosomal factor

[63] It is not disputed that despite the 'successful' SRS, the plaintiff's chromosome remained unchanged, ie that of a female. In fact, it is noteworthy the plaintiff's medical expert (PW3 and PW4) also agreed that even though the plaintiff now has a constructed male sex organ (penis) and was able to performed sexual intercourse, the plaintiff's chromosome remained as before the SRS ie the chromosome of a female. None of the plaintiff's medical experts gave evidence pertaining to the chromosomal factor. The closest would be PW4 who said that the definition of gender is not just based on the biology of the XX chromosome and XY chromosome but a mix of factors of biology, psychology and social aspects.

[64] Plaintiff counsel invited me to follow the decision in *Re JG, JG v Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90; [2005] 4 CLJ 710 wherein James Foong J in allowing the plaintiff's claim and in refusing to follow *Corbett* on the need to prove the chromosomal factor states the following:

> ... And in the end, like in most of these cases favouring *Corbett v Corbett* test, the garnet is thrown back at legislative body to make the necessary laws for the court to follow if Parliament so wishes. But then again, the legislative body would depend on the medical opinions. And here, in this instant case, the medical men have spoken: the plaintiff is female. They have considered the sex change of the plaintiff as well as her psychological aspect. She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that a woman.

[65] The case decision abovesaid was followed by His Lordship S Nantha Balan J (as His Lordship then was) in *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara* [2016] 12 MLJ 370; [2016] 8 CLJ 427 whereby His Lordship decided to depart from the cases decided earlier on the requirement of 'chromosomal factor' and stated that:

> ... In my view, the chromosomal requirement is archaic and should be discarded because scientifically it is impossible for a biological male to have female chromosomes and vice versa. The male XY and female XX chromosome will remain static throughout the individual's natural life. Hence it is naive to suggest that an applicant has to show that he or she has the chromosome of the re-assigned sex. It plainly means that to insist of the chromosomal requirement is to ask for the impossible and I think that nothing can be more unjust than that.

> To my mind, the better view with regards to the chromosomal issue is that which has been encapsulated in the approach that was taken by the Family Court in Australia in *Attorney General for the Commonwealth v 'Kevin and Jennifer' (Human Rights and Equal Opportunity Commission intervening)* [2004] 2 LRC 254; [2003] Fam CA 94 where at para 295 of the judgment, the court emphasised the importance of abandoning the chromosomal factor and highlighting the imperative need to view the matter from the physiological and physiological perspective.

[66] As earlier mentioned *Tan Pooi Yee* was subsequently overruled by the Court of Appeal which endorsed the ruling/decision in *Corbett.*

[67] The defendant's counsel also invited this court to follow the case of *Re Kevin*, which counsel submitted was just and in keeping with the current social and medical development. Counsel invited this court to steer clear of the cases of *Corbett* and *Bellinger* which was not followed by *Re Kevin.* Having read through *Re Kevin*, it seems to me, the two English cases abovesaid were not followed because to do so would be inconsistent with Australian laws. At para 326 of the judgment of the court where it was held as follows:

> 326. ... in my view there are overwhelming reasons why the application should be granted. I see no basis in legal principle or policy why Australian law should follow the decision on *Corbett*. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws ...

[68] However, in our present case, learned counsel failed to show in what way the decision and principle in *Corbett* which was accepted by our court in amongst others, *Kristie Chan* is at loggerhead with our existing laws.

[69] Therefore, having considered and appraised the abovesaid, I am not persuaded by PW4's contention that gender is not just based on the biology of the XX chromosome and XY chromosome but a mix of factors of biology, psychology and social aspects. Bearing in mind, chromosomal factor is one of the crucial and determining factors as held in *Corbett*, *Bellinger* and *Kristie Chan*, I find that the plaintiff has failed to showed to the court that chromosomal factor/criterium has been fulfilled as required. I am in concurrence with the learned SFC that the plaintiff has failed to comply with the test as stipulated by the Court of Appeal in *Kristie Chan* which endorsed the decision in *Billinger* and *Corbett*. Predicated on that I find that the plaintiff failed to prove her claim.

[70] Next, I move on to the last issue, issue (iii).

Issues (iii) — Whether the plaintiff's application to correct/amend her nric in particular, the status of her gender from 'female' to 'male' ought to be allowed?

[71] Issue (iii) pertains to reliefs (b) and (c) of the plaintiff's statement of claim, ie , to correct/amend the particulars in her NRIC pertaining to the status of her gender, the last four numerical digits and her name.

[72] In my view, that reliefs (b) and (c) is somewhat dependent on the outcome of the plaintiff's claim for reliefs (a). As earlier explained, the claim for relief (a) was dismissed/disallowed by me. Following the dismissal of relief (a), I am of the considered view that the claim for reliefs (b) and (c) of the SOC now has no legs to stand on and as such must also fall and be dismissed. On that score alone, the plaintiff's claim for reliefs (b) and (c) are dismissed. Be that as it may, I shall now proceed to determine Issue (iii) on its merit.

[73] All matters concerning the documents for registration of identity (Certificate of Birth and NRIC) of a person is governed under the provision of the National Registration Act 1959 (Revised 1972) ('Act 78') and the Births and Deaths Registration Act 1957 ('Act 299') and the regulations enacted thereunder. Any alteration, correction or amendment to the content in the NRIC can only be made under reg 14 of the PU(A) 472/90. In my view, it is evident that s 27(3) of the Act 299 excludes the reliefs sought for by the plaintiff herein. In *Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551; [2005] 1 CLJ 622 which involved a similar situation, it was held that there was no error/mistake pertaining to the details in the plaintiff's NRIC to empower the court to grant the reliefs sought for. VT Singham J at p 636, in dismissing the claim by Wong (the applicant) to correct/amend his gender/sex status in his NRIC from male to female, made following findings:

> (a) The relevant legislation that the birth register may be amended only if an error was made in the initial registering of the birth is s 27 of the Act 299/1957. The other relevant legislation is s 6(2) of the Act 78/1959. In the present case, there was no error in the sex of the applicant as initially entered in the birth certificates and thereafter the identification card. There was no medical examination that that there was a mistake in fact or substance at the time of the registration of birth. In fact, the biological change on the applicant was by medical or surgical means and this was supported by the applicant's own evidence and material produced before the court.
>
> (b) A person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken. Further, the words 'man' and 'female' in the relevant documents do not include persons of reassigned sex and should not be contrary to the biological characteristics of the person when born.
>
> (c) The reassignment surgery did not affect the status of the applicant's true gender at the time of birth. Further, this court has no power to grant the application on the ground that there was gender reassignment surgery.

A There was also no express legislation to re-register the gender of a transsexual or register a transsexual under the guise of any error or fact or substance in the register pursuant to s 27(3) of the Act 299 and s 6(2) of the Act 78/1959. An entry in the register book too, is regarded as a record of fact at the time of birth and the birth certificate constitutes a document revealing not current identity but historical facts.

B

(d) ... The practice of the registrar general is to apply exclusively the biological criteria, chromosomal, gonadal, and genital sex as informed by the parents or guardian of the child. The fact that the later in life the person's 'psychological sex' is at variance with its biological constituents cannot be considered to invoke s 27(3) of Act 299/1957 so as to imply that the initial entry was a factual error. A change in the initial entry will be contemplated in the following circumstances, namely, in cases of clerical error, error of fact or substance, wrong identification of the apparent and genital sex of the child at the time of birth; where the biological criteria are not congruent.

C

D

[74] Being a decision of a court of coordinate jurisdiction, the said decision is not binding but of persuasive value to me. Having perused the said judgment, I cannot find any reason to disagree with the said ruling/decision. I am in concurrence with His Lordship's finding that correction/amendment to the NRIC can only be made upon proof that there occasioned a mistake/error in respect of the particulars at the time when such document was issued by the registration department.

E

F

[75] Similarly, in our case, there was no such mistake/error being committed by the defendant. The particulars relating to gender in her NRIC is correct at the time of issue. Noteworthy, the particulars in the NRIC, including relating to the plaintiff's gender were all given by the plaintiff's parent.

G

[76] Apart from the abovesaid decision, I am persuaded by the official records in the Hansard of House of Representatives dated 6 December 2004 which, inter alia, recorded the following:

H

> maka keterangan jantina yang diberikan adalah berdasarkan kepada pengesahan permohonan atau pengawai perubatan ketika kanak- kanak tersebut dilahirkan. Percanggahan atau kesilapan mengenai jantina tidak mungkin berlaku dan walau bagaimanapun *Akta Pendaftaran Kelahiran dan Kematian membenarkan supaya pindaan dilakukan jika berlakunya kesilapan teknikal semasa pendaftaran dan kelahiran tersebut dilakukan.* (Emphasis added).

I

[77] As mentioned earlier, the plaintiff in our case, the application to correct/amend her NRIC was made after her SRS and not due to mistake/error in her birth certificate (BC) or to her NRIC. Thus, based on the abovesaid, I

find that, on a balance of probability, the plaintiff failed to prove that she is entitled to reliefs (b) and (c). Thus, the plaintiff's claim for reliefs (b) and (c) are dismissed accordingly.

Decision and findings of the court for issue (iii)

[78] Having appraised the related facts I agreed with the submission by the learned SFC. I am of the view that, in the circumstances of this case the court is not empowered to overstretch its judicial power to change particulars pertaining to gender, name and the numerical digits of the NRIC.

OVERALL CONCLUSION

[79] After having appraised the facts and circumstances as a whole, I find that the plaintiff may have fulfilled two of the criteria as stated in the WHO DSM-5 but failed prove the chromosomal element, an essential and conclusive element to prove a person's gender. Therefore, based on the position of the law as held in the cases of *Kristie Chan*, *Bellinger* and *Corbett*, on the reasons explained earlier on in this judgment, on the balance of probability, I find the plaintiff has failed to prove her claim. Hence, the plaintiff's claim against the defendant is dismissed with costs of RM10,000.

Plaintiff's claim dismissed with costs of RM10,000.

Reported by Dzulqarnain Ab Fatar